IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/07/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.A.No.672 of 2002 and C.A.No. 759 of 2002 and C.A.No. 825 of 2002

Abdul Majeeth .. Appellant in CA 672/02

Raju .. Appellant in CA 759/02

Shankar .. Appellant in CA 825/02

-Vs-

State by
Inspector of Police
NIB CID
Chennai
(Crime No.30 of 2001) .. Respondent in all
appeals

These criminal appeals are preferred under S.374(1) of The Code of Criminal Procedure against the judgment of the Principal Special Judge for NDPS and EC Act, Chennai made in C.C.No.160 of 2001 dated 17.4.2 002.

!For Appellant in
CA 672/02 : Mr.R.Loganathan

For Appellant in
CA 759/02 : Mr.R.C.Paul Kanakaraj

For Appellant in
CA 825/02 : Mr.Ganesh Rajan

^For Respondent : Mr.V.Jaya Prakash Narayanan
Government Advocate
(Criminal Side)

:COMMON JUDGMENT

This judgment shall govern all the three appeals namely C.A.Nos.672, 759 and 825 of 2002.
2. The appellants who were ranked as A-1 to A-3 respectively and who stood charged and tried under S.8(c) r/w Ss 21 and 29 of the N.D.P. S. Act and found guilty under S.8(c) r/w S.21 of the Act and sentenced each to

undergo 10 years R.I. and to pay a fine of Rs.1,00,000/-, in default, to undergo 1 year R.I., have brought forth these appeals. All the appellants/A-1 to A-3 were acquitted of the charge levelled under S.29 of the NDPS Act.

3. The brief facts necessary for the disposal of these appeals can be stated as follows:

(a) On 6.4.2001 at 15.45 hours, P.W.3 Karunanidhi, Inspector of Police, NIB CID, Madras, received secret information through his informer with regard to the illegal possession of heroin by A-1 and A-2 at C.N.K. Road near Mercy Guest House, Chepauk, Madras. Immediately, he reduced the same into writing, which is marked as Ex.P5, and sent the said information to his superior officer. Accompanied by P.W.2 Radhkrishnan-Head Constable, Narayanasamy-Sub Inspector of Police, Dhandapandi-Constable 113, 2365 Constable, 3256 Constable and 12616 constable, P.W.3 proceeded to Mercy Guest House and waited in front of the Guest House and was keeping the watch for the movements of the drug pedlars. P.W.3 requested one Anthony, son of Arulappan, to be a witness, who agreed to be so. When he approached one Gurunathan with the same request, he refused. Hence, he deployed Sub Inspector Narayanasamy and P.W.2 Head Constable of Chennai NIB CID as witnesses. As pointed by the informant, at 17.00 hours P.W.3 Inspector intercepted the accused, who in turn revealed their names as Raju and Abdul Majeeth with their addresses. They were found carrying brown coloured wire bag and white polythene bag containing something in it. After revealing the identity and the information regarding their involvement in heroin trafficking, P.W.3 expressed his desire to search them. He informed them of their right to be searched in front of a Magistrate or a gazetted Officer as contemplated under S.50 of the NDPS Act. But, A-1 and A-2 informed that such formalities were not necessary, and search could be conducted by P.W.3.

(b) On observing all legal formalities and obtaining their consent in the written notices marked as Exs.P6 and P7 respectively, P.W.3 conducted the search on their person with the assistance of the party. During the search, A-1 was found in possession of 1000 grams of heroin in the white polythene cover folded in khaki sheet, kept in the brown coloured wire bag in his hand. A-1 had no valid permit or licence for his conscious possession of the narcotic drug. Thereafter, P.W.3 conducted the search on the person of A-2, and he was found in possession of 500 grams of heroin. Two samples from 1000 grams of heroin possessed by A-1 were taken following the procedures contemplated under the NDPS Act in front of P.W.2 and P.W.4 Arockiasamy under Ex.P3 mahazar and sealed the samples as S1 and S2. The remaining portion of heroin was covered and sealed as B1. P.W.3 took two samples from 5 00 grams of heroin possessed by A-1 under Ex.P3 mahazar in front of P.Ws.2 and 4 and sealed the samples as S3 and S4. The remaining part was sealed as B2. A-1 and A-2 were arrested and the same was intimated through Exs.P8 and P9. Thereafter, P.W.3 recorded the confessional statements voluntarily made by A-1 and A-2 in front of the witnesses. The admissible portion of the confessional statement given by A-1 and A-2 were marked as Exs.P12 and P13 respectively.

(c) On the basis of the information provided by A-1 and A-2 under Exs.P12 and P13, P.W.3 along with the team proceeded to Triplicane, Avullia Street, 4th Cross Street, Raja Telecommunication where A-3 was apprehended. After informing about his right to be searched before a Magistrate or a gazetted Officer as contemplated under S.50 of the Act through Ex.P14 and on his consent, a search was conducted. A-3 was found in possession of 500 grams

of heroin, and the same was seized under Ex.P4 mahazar in front of the witnesses. Two samples were taken, which were sealed and marked as S5 and S6. The remaining part was sealed and marked as B3. P.W.3 arrested A-3 and gave intimation memo under Ex.P15. The confession voluntarily made by A-3 was recorded by P.W.3. All the accused and the seized contraband were brought to NIB CID Office. A case in Crime No.30 of 2001 under S.8(c) read with 21 and 29 of NDPS Act was registered. Ex.P17 is the printed FIR in that regard. A special report as contemplated under S.57 of the NDPS Act marked as Ex.P21 was placed before the Additional Deputy Superintendent of Police, NIB CID and handed over to P.W.5 Murugan, Inspector of Police, NIB CID, Investigation Officer on the direction of the Additional Superintendent of Police. The arrest of A-1 to A-3 was intimated to the relatives through Exs.P18 to P20 respectively. On 6.4.2 001, P.W.5 Investigation Officer received all the records and the case properties pertaining to this crime. He recorded statements from the witnesses. On 7.4.2001 P.W.5 produced A-1 to A-3, the records and the properties before the XIV Metropolitan Magistrate, Egmore. He made a request under Ex.P23 for sending the case properties for chemical analysis. On 19.4.2001 P.W.1 Tmt.Devaki, Chemical Analyst received the samples of S1 to S6 from the Court, made test on them and found them to be heroin, a narcotic substance and sent her report under Ex.P2 to the Court on 14.6.2001. The successor in Office to P.W.5 Mr.Mohan on completion of the investigation filed a charge sheet under S.8(c) read with other provisions of the NDPS Act.

4. In order to prove its case, the prosecution examined 5 witnesses and marked 24 exhibits and 10 material objects. After the evidence on the side of the prosecution was over, the appellants/accused were questioned under S.313 of Cr.P.C. as to the incriminating circumstances found in the evidence of the prosecution witnesses, and the accused flatly denied the same as false. After considering the rival submissions and scrutiny of the available materials, the trial Court found them guilty under S.8(c) read with 21 of the NDPS Act and sentenced them to imprisonment as stated supra.

5. Heard the learned Counsel for all the three appeals and the learned Government Advocate (Criminal Side) in extenso.

6. Arguing for the appellants, the learned Counsel brought forth the following submissions for the consideration of this Court.

The prosecution came forward with a specific case that on an information, P.W.3 after reducing the same into writing marked as Ex.P5, proceeded to one Mercy Guest House in C.N.K. Road, Chepauk and intercepted the accused in the presence of two witnesses, and on search, he found A-1 with 1000 grams of heroin and A-2 with 500 grams of heroin. According to P.W.3, he reduced the information into writing. A perusal of Ex.P5 would clearly reveal that it was not an information at all. It did not contain the address or particulars of A-1 or A-2. It contained only two names. It is pertinent to note that it did not have any reference to A-3 at all. As per the information, the accused could be caught between 4.30 P.M. and 6.00 P.M. But, a perusal of the F.I.R. would reveal that a different time between 4.30 P.M. and 10.3 0 P.M. is stated therein. The only one independent witness examined by the prosecution has turned hostile, and thus, the prosecution was to rely only on the Constables as witnesses. The name of P.W.4 is found in all the records as Anthony, but at the time of evidence his name was

introduced as Arokiasamy, which gives room for a lot of suspicion whether such a witness was at all available at that time, and this fact coupled with the evidence of the witness, who turned hostile would go a long way to show that it was only a cooked up affair. P.W.3 has spoken in his evidence in categorical terms that in the label affixed on the samples, the crime number of the case was also noted. This single fact would be suffice to show that the arrest, seizure, recovery mahazar and all these documents have come into existence only after the case was registered at the Police Station, and hence, the same would falsify the case of the prosecution. A detailed report as contemplated under S.57 of the NDPS Act has not been complied with. From the available records, it would be evident that the Additional Superintendent of Police was also in the team, and under usual supervision, P.W.3 Inspector has proceeded with all along affair, and hence, P.W.3's evidence that a detailed report as contemplated under S.57 of the Act was sent to the Additional Superintendent of Police cannot in any way satisfy the legal requirement. It is true that S.57 is only directory and not mandatory, but it did not mean that the same need not be complied with, and in order to ensure the other provisions of the Act, the Legislature has thought it fit the introduction of S.57 of the Act. But, it has not been complied with in the instant case.

7. Added further, the learned Counsel that the alleged recovery was made on 6.4.2001, and the same was produced before the Metropolitan Magistrate on 7.4.2001; the contraband was produced before the Special Court only on 19.4.2001; that the prosecution has not explained as to in whose custody the property was on 6.4.2001 and 7.4.2001 and subsequently from 7.4.2001 to 19.4.2001; that if the property was in the custody of the Officials concerned, there was all possibility of tampering of the samples, and hence, that part part of the prosecution case casts a doubt on the entire case itself.

8. Apart from the above arguments advanced, the learned Counsel appearing for the appellant/A-3 brought to the notice of the Court that A-3's name is not even mentioned in the information; that according to the prosecution, he was arrested only on the information, which came to the knowledge of the officials on the statement given by A-1 and A-2, but it is found that on the basis of Ex.P14 secret memo received by P.W.3, A-3 was arrested, and this casts a doubt whether any information was received by the Official at all; that the time of arrest is shown in Ex.P5 seizure mahazar and Ex.P15 arrest memo originally as 20.50 hours, and the same has been altered by overwriting as 22.00 hours; that the case of the prosecution was that A-3 was arrested and search was made at Avulia Street, Triplicane, but from Ex.P16, it could be found that he was arrested in front of Mercy Guest House, and thus, the time and place of arrest and seizure are highly doubtful, and all these totality of facts and circumstances would clearly indicate that the case against A-3 is nothing but a false one; that in view of all the above, the lower Court without proper appreciation of evidence has found him guilty, and hence, the appellant/A-3 should be acquitted of the charges.

9. Opposing all the contentions of the appellants' side, the learned Government Advocate would submit that it is true that only one independent witness was examined, but he turned hostile; that it is a case where the other witnesses were attempted to be taken as witnesses, but they refused to be so; that it is not a case where independent witness was not examined, but one was examined and he turned hostile; that the Constables who belonged to the Department, have categorically spoken to the factum of arrest, possession of

contraband with the accused and its seizure under proper mahazar; that the appellants are unable to show any reason or circumstance to suspect the evidence of P.Ws.2 and 4, and hence, their evidence is in tact, which has got to be believed by the Court; that in the absence of any material to reject the evidence of P.W.4 coupled with the evidence of P.W.3, the arrest of the accused and the seizure of contraband from them have got to be accepted by the court; that so far as information under Ex.P5 was concerned, it is not at all necessary that all the particulars as to the identity of the accused or address should be given; that a reading of Ex.P5 would make it clear that though elaborate information was received by P.W.3, only necessary particulars have been given thereunder, and thus, it does not make any doubt in the information which was subsequently reduced to writing; that the contention of the appellants' side that the crime number has been stated in the label affixed on the samples at the site of occurrence has got to be discountenanced for the simple reason that all the seizure mahazars and all the documents and the evidence of P.W.2, the independent witness do not speak anywhere that the crime number was put at the time and place where they were arrested and the contraband was seized; that it is true that P.W.3 has deposed like that, but this part of the evidence cannot be given much weight, in the absence of any other piece of evidence available through the case bundle containing number of documents and in view of the evidence of P.W.2, the independent witness, and thus, much reliance need not be placed on that part of the evidence of P.W.3; that P.W.4 Anthony @ Arokiasamy was examined before the trial Court; that it was not confronted to him that his name was only Anthony and Arokiasamy was a later introduction; that it is pertinent to point out that he has turned hostile and not supported the prosecution case, and hence, no significance could be attached to the said contention; that so far as the contention put forth by A-3 was concerned, no such discrepancy is found in the document as to the place of arrest; that the corrections that have been made by the officials have been explained in evidence, and in such circumstances, no significance could be attached to the said contention; that in view of the above reasons, the lower Court was perfectly correct in convicting the accused, and hence, the judgment of the lower Court has got to be sustained.

10. This Court paid its full attention on the rival submissions made and made a thorough scrutiny of the available materials.

11. As seen above, the specific case of the prosecution was that on a secret information, P.W.3 along with his Constables including P.W.2 proceeded to the Mercy Guest House, Chepauk on 6.4.2001 at about 17.00 hours; that when he was waiting with his party, A-1 and A-2 came there with the contraband; that they were intercepted; that after informing the right that they were entitled to be searched before a Magistrate or a gazetted Officer, the search was made in the presence of P.Ws.2 and 4; that A-1 was found in possession of 1000 grams of heroin, while A-2 was with 500 grams of heroin, and procedural formalities as contemplated under the Act were followed. The fact they were informed that they were entitled to be searched before a Magistrate or before a gazetted Officer is not in dispute. They replied that it was not necessary. Under such circumstances, a search was conducted, and the contraband was found and seized. It has been weighed in the presence of the witnesses, and mahazars were drawn, and samples were taken. A-1 and A-2 were arrested, and they were taken to the Police Station. The case was registered, and the property was produced before the XIV Metropolitan Magistrate, Egmore on

7.4.2001, and in turn it was produced before the Special Court. At this juncture, the contention of the appellants' side that on the label pasted on the samples, according to P.W.3, the crime number was written, and the same has fatally affected the prosecution case cannot be countenanced for the simple reason that all the records and the evidence of P.W.2 would clearly indicate that no such crime number was written at the place of occurrence, and hence, the said contention in view of the mistaken version given by P.W.3 that the crime number was also written on the label cannot be given much weight, as rightly contended by the State.

12. Insofar as the contention that all the contraband including the samples were placed before the XIV Metropolitan Magistrate, Egmore on 7.4.2001 and in turn it was placed before the Special Court, evidence is available in the case records. But, there is no material available to indicate that the property once it was placed in the hands of the Metropolitan Magistrate, was ever handed over to the Department thereafter. This would clearly indicate that the property was in the custody of the concerned Magistrate's Court, and hence, it would cast no doubt on the prosecution case. As to the non-examination of the independent witnesses, the contention of the appellants' side cannot be accepted for the reason that it is not a case where no independent witness was cited or examined. In the instant case, one independent witness was examined as P.W.4, but he turned hostile, and hence, this could not be complained of against the prosecution. As rightly pointed out by the learned Government Advocate, the appellants' side is unable to show any reason or circumstance to disbelieve the evidence of P.W.2, though he is a Constable attached to the Department. In the absence of any circumstance or reason strong enough to disbelieve his evidence, his evidence has got to be accepted. Thus, the prosecution has clearly proved that A-1 and A-2 at the time of occurrence were in possession of 1000 grams and 500 grams of heroin respectively. Once the prosecution is able to prove that they were in possession at the time, it has got to be construed as conscious possession and with knowledge also. In such circumstances, the law would expect the rebuttal of the presumption that they had got the mental state to possess the contraband as contemplated under the provisions of the Act. But, A-1 and A-2 have miserably failed to do so. Hence, it can be easily construed that they were in illegal possession of the said contraband at the relevant time. Therefore, the lower Court was perfectly correct in coming to the conclusion that A-1 and A-2 were guilty under S.8(c) read with 21 of the NDPS Act. The Court is unable to notice anything to interfere either in the conviction or sentence imposed on A-1 and A-2 by the Court below. However, the default sentence of 1 year R.I. awarded by the trial Court has got to be reduced to 3 months R.I. In other respects, the judgment of the lower Court in respect of A-1 and A-2 has got to be affirmed.

13. So far as the case of the prosecution against A-3 is concerned, the Court is unable to agree with the State. The specific case of the prosecution was that on the information, which came to the knowledge of P.W.3, he proceeded to the place of A-3 at Avulia Street, Triplicane and arrested him. The contraband in his hand was seized. As rightly pointed out by the learned Counsel for the appellant/A-3, as found under Ex.P16, only on secret information, P.W.3 proceeded and completed the formalities, and thus, it becomes highly doubtful whether any such information with regard to A-3 was received by him. According to the prosecution case, A-3 was arrested at 22.00

hours at his place in Avulia Street, Triplicane. A perusal of the vital documents in that regard namely Ex.P4 seizure mahazar and Ex.P15 arrest memo would clearly show that it was originally written as 20.15 hours and subsequently, it has been overwritten as 22.00 hours, which creates a doubt on the time of the alleged arrest and seizure. Further, the place of arrest seems to be different. According to the prosecution case, the arrest and the seizure have taken place at A-3's place at Avulia Street, Triplicane. But, Ex.P16 inspection memo would indicate that he was arrested in front of Mercy Guest House, Chepauk. Thus, in the instant case, the place and the time of arrest of A-3 are highly doubtful. In a case like this, where the prosecution has miserably failed to prove the place and time of arrest of A-3, the Court has to go a long way to cast the entire doubt as to the seizure of the contraband from A-3 on the prosecution case. In view of such evidence, it would be highly unsafe to find that A-3 was in possession of the contraband as put forth by the prosecution. In such circumstances, the Court is of the considered view that the charge levelled against A-3 is not proved beyond reasonable doubt, and hence, A-3 is entitled for an acquittal in the hands of this Court. Therefore, the conviction and sentence passed by the lower Court on A-3 are liable to be set aside.

It is stated by the appellant/A-3 in the grounds of appeal that he has not paid the fine amount, and hence, no question of refund of the fine amount would arise.

14. In the result, the default sentence of 1 year R.I. imposed on A-1 and A-2 is modified, and in default of payment of fine awarded by the trial Court on A-1 and A-2, they shall undergo R.I. for 3 months. In other respects, the judgment of the lower Court is confirmed. With the above modification, both the criminal appeals in C.A.Nos.672 and 759 of 2002 are dismissed.

15. In the result, the criminal appeal in C.A.825/02 is allowed, setting aside the judgment of the lower Court in respect of the appellant/A-3. The appellant/A-3 is acquitted of the charge against him. The appellant/A-3 is set at liberty forthwith, if he is not required in any other case.

Index: Yes
Internet: Yes

To:

1) The Principal Special Judge for NDPS Cases, Chennai 104.
2) The Superintendent, Central Prison, Vellore.
3) The Public Prosecutor, High Court, Madras.
4) The D.I.G. of Police, Chennai 4.
5) Mr.V.Jaya Prakash Narayanan, Government Advocate (Crl. Side), High Court, Madras.
6) The Inspector of Police, NIB CID, Chennai.

nsv/